

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Annual Assessment of the Status of	)	CS Docket No. 01-129
Competition in the Market for the	)	
Delivery of Video Programming	)	

To: The Commission

**COMMENTS OF CAROLINA BROADBAND, INC.**

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## **I. INTRODUCTION**

On June 25, 2001, the Federal Communications Commission (“Commission”) released a Notice of Inquiry in CS Docket No. 01-129. The following comments are submitted by Carolina BroadBand, Inc. (“Carolina BroadBand”). These comments provide information about Carolina BroadBand and its business plan, the barriers to entry faced by Carolina BroadBand, and address some of the other comments raised by the Commission.

## **II. COMPANY OVERVIEW**

Carolina BroadBand is a broadband service provider (“BSP”) preparing to offer residential and business customers bundled voice, video, and data services, including high speed Internet access, in market clusters in North and South Carolina. Through the construction and operation of a new, state-of-the-art fiber optic network, Carolina BroadBand will offer a suite of facilities based services that will provide the first real competitive choice for residential and small-medium size business customers in its target markets. This technologically advanced network will allow Carolina BroadBand to provide the highest level of customer service using a highly trained work force and an integrated customer care and billing system that are both being specifically developed for broadband multi-service delivery.

Carolina BroadBand plans to build a high-capacity advanced broadband network in the Carolina’s targeting the major metropolitan areas including Charlotte, Raleigh/Durham, and Winston-Salem/Greensboro in North Carolina, and Columbia and Greenville/Spartanburg in South Carolina. The complete project will cost in excess of \$2 billion. In each of these markets Carolina BroadBand would be the only company providing residential consumers with wired competition to either the incumbent phone company or the incumbent cable TV provider.

Carolina BroadBand's ability to leverage its single network will provide customers who subscribe to one or more services the opportunity to choose a communications provider with the highest quality video entertainment, local and long distance telephone service, and high-speed Internet services at lower prices than their current provider offers.

The video service offering will include the types of services currently offered by the incumbent cable television provider in each market as well as advanced services not currently offered by the incumbent such as true video on demand ("VOD") services. Carolina BroadBand's video offering of over 200 channels of digital cable TV will include basic cable programming, an expanded basic tier of channels, a digital tier of channels, multiplexed premium channels, pay-per-view special events, 40 or more "commercial free" CD quality audio channels, video-on-demand with full VCR-like functionality, and interactive television. With its advanced network, Carolina BroadBand will deliver high quality digital video services like that of a direct broadcast satellite ("DBS") provider.

Carolina BroadBand will also offer a full suite of telephone services, including residential, business and wholesale services to its target customer base. Carolina BroadBand will launch with a lifeline quality, circuit switched telephone hardware and software platform that will allow the development of service offerings tailored to the customer's telephone needs. Carolina BroadBand will provide all local, regional, long distance, and international calling capabilities. With the advent of number portability, customers will be able to keep their existing telephone numbers when they switch over to Carolina BroadBand's telephone service, greatly reducing a customer's reluctance to change service providers. The telephone offering will include primary, as well as second, third, and fourth line capabilities for residential customers, and all custom calling services such as call waiting, caller ID, call blocking, three-way calling,

distinctive ringing, and automatic call-back. A full-featured voicemail service with multiple mailboxes for individual family members or employees will also be offered. When Voice over Internet Protocol (“VoIP”) becomes a commercially suitable carrier class telephone product, Carolina BroadBand will be able to migrate toward this platform.

Carolina BroadBand’s next-generation network will enable it to offer various levels of data bandwidth and performance by way of standards based “cable modems” and from ultra high-speed dedicated fiber connectivity direct to the business or telecommunications service provider’s premise. In addition to the proliferation of Internet access and the tremendous growth in time spent on the Internet, applications such as full screen full motion video, personal video conferencing, digital photography, virtual private networks, and multimedia e-mail will all increase the demand for Carolina BroadBand’s high capacity data services. Carolina BroadBand will also have enough excess network capacity to offer wholesale bandwidth to other service providers in our markets.

While competitive, facilities-based telephone and Internet access alternatives exist for some portion of large and medium-sized business customers in corporate high rises and dense office parks, Carolina BroadBand’s network will be unique in that it will physically pass most residences and a high percentage of underserved small to medium-sized businesses. Carolina BroadBand’s network will be buried in the public right-of-way or attached to existing utility poles on the street in front of the homes and businesses in its service territory. Upon receiving a service order, Carolina BroadBand will connect that customer’s home or business location directly to its own network by constructing a wire (“drop”) from that customer’s home or office to the street where it will be connected to Carolina BroadBand’s newly constructed high capacity network. Carolina BroadBand’s ubiquitous network will allow the company to provide all of its

communications services over its owned and operated facilities and not be dependant upon “reselling” the network or services of the incumbent telephone company. This will allow Carolina BroadBand to differentiate itself through complete control of the quality of service, packaging of services, billing, customer care, and the overall experience that the customer has with Carolina BroadBand from beginning to end.

Carolina BroadBand, a BSP, is one of a new breed of communications companies that typically provide voice, video, and data services to residential and business consumers. Unlike many of the CLECs that use unbundled RBOC facilities to provide services to business customers, competitive BSPs are building their own last-mile networks to provide services primarily to residential consumers. These new companies are exactly the type of competitor envisioned by the Congress when it enacted the 1996 Telecommunications Act. The Commission must be proactive and do everything possible to foster the growth and development of BSPs like Carolina BroadBand. Without aggressive intervention by the Commission, BSPs will fall victim to the many roadblocks created by well-financed incumbents including cable TV companies, telephone companies, and even electric utilities. If companies like Carolina BroadBand are allowed to fail due to the anticompetitive tactics of the incumbents, then residential consumers may never realize the competitive benefits and choices envisioned by the Congress.

### **III. BARRIERS TO MARKET ENTRY**

The Commission has asked for information regarding barriers to entry and consumer choice in the market. Barriers to entry for new competitive cable companies or new BSPs are numerous and significant. The most substantial barriers include: (1) access to venture capital and debt capital; (2) access

to poles, conduit, and rights-of-way; (3) access to residential and commercial customers located in multi-tenant environments (“MTEs”); and (4) access to all programming.

#### **A. Access to Capital**

If the FCC does not move quickly to eliminate the barriers limiting access to poles, conduit, and rights-of-way, residential and commercial customers located in MTEs, and video programming, then BSPs like Carolina BroadBand will find it very difficult to gain access to the venture and debt capital necessary to build competitive networks. Simply put, there will be no business. Without competitive networks, incumbent cable TV and local exchange companies will continue to control the market in the residential and small business sectors of the economy.

While the Commission may not be able to help BSPs attract new capital, the Commission can do great harm through inaction. By failing to aggressively enforce existing laws and rules designed to protect new competitive companies like Carolina BroadBand, the FCC sends a signal to investors that their investment is riskier than it would be if the Commission strictly and aggressively enforced the law. By failing to enact new rules to protect new telecommunications and cable ventures, the FCC sends a signal to the investor community that it does not support this type of competition. Thus the Commission has a huge opportunity to affect the success of telecommunications and cable competition, and the Commission’s actions and decisions will directly affect Carolina BroadBand’s ability to secure venture capital and debt capital.

The downturn in the capital markets, in conjunction with the incumbent’s delay tactics, has had a devastating impact upon investment capital for new construction, expansion, or upgrade of competitive video service providers’ networks. New loan volume (debt) committed to the telecom industry was an anemic \$2.4B in 4Q 2000 versus \$17.0B in 4Q 1999 (Source: 2001 S&P/Portfolio Management Group). This significant decline in new loan volume has had a larger impact upon the emerging providers who are unable to secure debt and thus forced to suspend any expansion/upgrade plans or discontinue operations.

## **B. Access to Poles, Conduit, and Rights-of-Way**

Carolina BroadBand has encountered significant roadblocks in obtaining efficient, cost-effective, nondiscriminatory access to utility poles owned by Duke Power, Carolina Power & Light, and BellSouth. These companies forced Carolina BroadBand to halt construction of its network by imposing unreasonable financial, engineering, and coordination constraints. This brings the issue of access to poles into clear focus, because Section 224 of the Telecommunications Act specifically requires that pole owners provide nondiscriminatory access, charging rates that are just and reasonable. The existence of these laws and the rules that support them has little effect on the companies required to comply with them. In Charlotte, North Carolina, Duke Power and BellSouth have refused to allow Carolina BroadBand to attach to the backside of their poles. Backside pole attachment is an efficient, cost-effective method of constructing communications networks. This type of pole attachment is completely safe and is a recognized methodology. Carolina BroadBand has surveyed these poles and found that a significant percentage (nearly 25 percent in the case of BellSouth and Duke Power) already have attachments on the backside. Current backside attachers include Time Warner, BellSouth, and DukeNet, each of which is a direct competitor to Carolina BroadBand. In essence, Duke Power and BellSouth are giving preferential treatment to their own business or telecommunications subsidiary, while denying Carolina BroadBand the same pole position others occupy. This action directly violates Section 224 of the Telecommunications Act as amended. Unfortunately, the burden of proof falls on Carolina BroadBand, and it can take hundreds of thousands of dollars and years of litigation and appeals to prove that the law has been broken. Companies like Carolina BroadBand cannot afford this huge expense of time and money.

Backside attachments are essential to building network in an efficient, cost-effective manner. There is no credible reason why Carolina BroadBand should be denied permission to use the open space on the backside of a utility pole. Furthermore, cable TV company pole attachments are often placed in an



apparent random fashion. By placing attachments randomly on poles, the incumbent cable TV provider creates space problems for the next attacher, in this case Carolina BroadBand. These “random” attachments can discourage future BSPs or competitors who must spend additional time and money rearranging the incumbent’s facilities in order to make space on the pole. The solution: open the backside of the pole to new networks, thus saving time and money for new competitors, and increasing the likelihood that new networks will be built.

**The Commission should establish a Task Force to investigate the competitor access to poles, conduit and rights-of-way, and to evaluate the effectiveness of Section 224 of the Act in encouraging the construction of new competitive networks.**

In the opinion of Carolina BroadBand, the requirements of Section 224 are not being met by pole owners, and there are no apparent enforcement mechanisms in place that encourage compliance. Without an established enforcement policy, and without established enforcement mechanisms pole owners are free to push the limits of the law, knowing that many attachers do not have the time or resources to litigate every violation. Proof of this may be found in Duke Power’s refusal of an FCC invitation to participate in the mediation of pole attachment issues requested by Carolina BroadBand.

### **C. Access to Consumers in Multiple Family Dwelling Units (“MDUs”)**

Barriers also exist with respect to access to multifamily dwelling units or MDUs. For example, in Charlotte, North Carolina 30 percent of all housing units are located in MDUs (most U.S. cities exhibit a similar percentage of MDUs). Most of these MDUs cannot be served by a BSP like Carolina BroadBand, because the incumbent cable TV company, Time Warner, has established exclusive agreements with the owners of these MDUs. Carolina BroadBand has surveyed owners and managers of these MDUs and found that 80 percent of the units surveyed have already committed to a long-term exclusive agreement with Time Warner. Many of these MDUs committed to an exclusive arrangement with Time Warner in the last 24 months (since Carolina BroadBand announced it was going to serve Charlotte), and many of

these agreements are for 10 to 15 years. These exclusive agreements, deny consumers their right to choose a different cable TV provider, and they block consumer access to an alternative Internet provider and even a competitive phone company. They also deny Carolina BroadBand its right to serve these customers. While the Commission prohibits exclusive franchises, Time Warner and other incumbent cable TV companies have found a way to establish de facto exclusive franchises. By declaring huge portions of cities off-limits to competition through the use of exclusive contracts with MDUs incumbent cable TV companies have constructed an almost insurmountable barrier to entry.

MDUs are only a separate submarket because the incumbent cable TV provider and the MDU owners have set them apart. A company like Time Warner is granted a franchise to serve an entire market, such as the city of Charlotte. Carolina BroadBand has also been granted a franchise to serve the entire city of Charlotte, but is being denied access to nearly 30 percent of the homes by anticompetitive, exclusive agreements. By leveraging property owners/managers with up-front payments, revenue sharing, and free services, the incumbents are using their dominant market position and substantial revenue base to keep newcomers from entering the MDU "submarket."

**The Commission should establish rules prohibiting cable TV or telecommunications companies from establishing exclusive contracts with residential MDU owners that would deny consumers the right to choose a cable TV or telecommunications provider of their choice.**

Once the Commission finds that residential MDU dwellers are entitled to choices in cable TV, telephone service, and high-speed Internet, methods of access must be considered. Rules allowing equal access to home run wiring must be developed so that consumers can choose among competing providers without imposing unreasonable requirements on property owners. The rules must also consider whether home run wiring belongs to or should be controlled by the incumbent cable operator, the property owner, or the tenant. Existing wiring may, or may not have been put in place by, or at the expense, of the incumbent. Either way, mechanisms should be established to allow competing providers to share access

to customers. It should not be assumed that home run wiring in MDUs is owned by the incumbent cable company, and steps should be taken to avoid requiring the installation of new wiring inside MDUs.

**The Commission should establish rules allowing the joint use of home run wiring in residential MDUs. These rules should allow any competitive provider of cable TV service to use home run wiring in residential MDUs. The rules should also consider if and when the certified owner of the home run wiring is due compensation.**

Without help from the FCC, residential consumers living in MDUs will never realize the benefits of competition envisioned by the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act"), and the Telecommunications Act of 1996 ("1996 Act").

#### **D. Access to All Programming**

Access to programming is critical to an emerging competitive BSP such as Carolina BroadBand. Without the current program access rules, it is doubtful that Turner Broadcasting (TBS, Turner South, Turner Classic Movies, Cartoon Network, CNN, etc.), HBO (and Cinemax), or Warner Brothers would license their programming to Carolina BroadBand who would be a competitor to Time Warner Cable. The absence of this programming would cripple Carolina BroadBand and in fact could hinder any funding opportunities for Carolina BroadBand since potential Private Equity investors would see this as an insurmountable barrier of entry.

**The Commission must continue to preserve and protect competition and diversity in the distribution of video programming, and it must continue the prohibition on exclusive program access contracts.**

Given the past attempts by cable operators to enter into exclusive contracts for programming, any change in the prohibition on exclusive contracts for program access would cripple any potential video service provider. In addition, the program access rule has also allowed for fair and reasonable access to programming. All of the major cable operators either own outright or own an interest in programming assets. For example, Time Warner: HBO, Cinemax, TBS, CNN, Turner Classic Movies, Turner South, Cartoon Network, etc; Comcast: Comcast SportsNet, E!, Style!, Golf Channel; Cox: Discovery

Networks and associated channels; Charter: TechTV; Cablevision: MSG, Fox Sports NY, AMC, Bravo, WE, IFC. The cable operators have in the past leveraged exclusive contracts to deny programming to competitors and will do so in the future. The cable operators have promoted the fact that they are the only distributor in a given market for exclusive product (Comcast SportsNet). For example, Continental Cablevision for example entered into an exclusive arrangement with HBO in the Detroit area denying Ameritech New Media the ability to carry HBO until the end of 1998. Ameritech New Media responded by not building their competitive cable network in Continental Cablevision served areas until they were able to offer HBO. AOL Time Warner is creating a Carolina-centric news channel in partnership with Belo in Charlotte-NC and Raleigh-NC that Carolina BroadBand would want to carry. AOL Time Warner has launched similar news channels in other parts of the country and have denied competitors carriage of this news channel. DirecTV and EchoStar do not carry NY1. Grande Communications, DirecTV and EchoStar do not carry AOL Time Warner's Austin-TX news channel.

***1. Is the coverage of the program access rules appropriate?***

The program access rules must be expanded to open access to programming delivered both via satellite or terrestrially. In addition, the program access rules need to expand to include content delivered from all platforms such as Internet, Interactive Program Guide, Video-on-Demand (server), interactive television, etc. Carolina BroadBand must have the ability to offer AOL or Earthlink or @Home to its subscribers. Carolina BroadBand has uncovered exclusive arrangements whereby video-on-demand providers, interactive program guide providers and set-top box manufacturers have refused to license product and thus programming as a result of exclusive contacts with cable operators. These are examples of cable operators attempting to deny critical technology (video-on-demand technology) to cripple an emerging competitor.

**2. *To what extent has video programming once delivered by satellite been migrated to terrestrial delivery?***

Carolina BroadBand is very concerned that Comcast will migrate Comcast SportsNet MidAtlantic (the former Home Team Sports) from satellite to terrestrial delivery and then refuse to offer this product to Carolina BroadBand in the Raleigh, NC market. Comcast did a similar migration from satellite to terrestrial delivery after purchasing SportsChannel in the Philadelphia market (now called Comcast SportsNet). In Philadelphia, Comcast has refused to license this product to competing video platforms such as RCN, DirecTV and EchoStar. Cablevision has done the same in the New York market with overflow sports product from their MSG and Fox Sports NY channels (overflow sports was formerly offered via satellite on MSG2).

**IV. RESPONSES TO OTHER QUESTIONS RAISED IN THE COMMISSION'S NOI**

**A. In what areas do incumbent cable operators face an overbuilder**

BSPs are increasing their coverage throughout the US as the cable TV market demands competition for lower prices and better quality of service. Presently, we are aware of BSPs in the following areas: San Marcos-TX, Austin-TX, Sacramento-CA, Lexington-NC, Lenexa-KS, Delaware County-PA, Charleston-SC, West Point-GA, Montgomery-GA, Panama City-FL, Dothan-AL, Evansville-IN, Walnut Creek-CA, Boston-MA, Redwood City-CA, Annapolis-MD.

**B. Is overbuilding increasing or decreasing? What factors affect the amount of overbuilding?**

While overbuilding is a self-serving and somewhat derogatory term coined by incumbents, a more correct term would be either "broadband service provider" or "competitive facilities-based video provider." The number of competitive facilities-based video providers has dramatically decreased over the six months. McLeodUSA has recently stopped their build in Cedar Rapids-IO. Wide Open West has

shelved their plans to build broadband networks in Texas and Missouri. Utilicom has postponed their network build for Indianapolis-IN and Dayton-OH. American Broadband and Digital Access have shut down entirely. Utilicorp (formerly known as Everest Connections) has shelved their plans for expansion in Minneapolis, MN. Seren Innovations has cut expansion and stopped any further build-out in Contra Costa County, CA and in Central Minnesota. Finally, Carolina BroadBand has announced that it too must delay the construction of its networks in Charlotte and Raleigh, NC due to our inability to secure additional debt financing.

The FCC can encourage more facilities-based video service providers by establishing enforcement mechanisms that will both monitor compliance with Section 244 of the Act, and assess penalties when pole owners fail to comply. Currently, there is no way for the Commission to monitor compliance. The BSPs themselves must, therefore, police and prosecute Section 224 violators. This process has not produced good results, and thus is a contributing factor in the BSP slowdown.

**C. What effect do existing commission regulations and other provisions of law specific to video competition have on the market?**

Existing regulations appear to be inadequate. The Commission's existing regulations must go further in ensuring, at a minimum, that all video service providers have equal access to programming, MDUs, poles, conduit, and rights-of-way at fair and reasonable prices.

**V. SUMMARY**

We are on the threshold of a new era in residential competition. BSPs are poised to offer residential consumers new services, expanded choices, and truly high-speed data service. Unfortunately, incumbent local exchange companies, cable TV companies, and electric utilities are gaming the entry process for BSPs. These incumbents are creating huge roadblocks and detours for BSPs to navigate. Unless the Commission takes control, and establishes rules and enforcement mechanisms with teeth there is little hope that residential consumers will ever realize the competitive benefits and choices envisioned by Congress when it enacted the Cable Television Consumer Protection and Competition Act of 1992,

and the Telecommunications Act of 1996. Investors have interpreted the Commission's lack of enforcement as reason to move their money out of the emerging telecommunications market. The bottom line is becoming increasingly clear – without active involvement and enforcement by the Commission local residential competition is likely to fail.